

ECF



October 19, 2016

VIA ECF AND REGULAR MAIL

Honorable Michael A. Shipp, U.S.D.J.
 United States District Court
 Clarkson S. Fisher Federal Building & U.S. Courthouse
 402 E. State Street
 Trenton, NJ 08608

Re: *Lucia Candelario, Individually and on Behalf of All Others Similarly Situated v. Vita-Mix Corporation*
 United States District Court for the District of New Jersey
 Civil Action No. 3:16-cv-02260-MAS-DEA

Dear Judge Shipp:

We represent the defendant Vita-Mix Corporation in this case. We have a fully briefed Motion to Dismiss pending before Your Honor. [Document No. 4 Filed 05/31/2016; Document No. 7 Filed 07/05/2016; Document No. 8 Filed 07/12/2016 Document 9 Filed 09/21/16; Document 12 Filed 09/29/16]. I write to call Your Honor's attention to a recent Order filed on October 12, 2016 along with an Oral Opinion of the Honorable Peter G. Sheridan that involves an issue on our pending Motion to Dismiss.

On October 12, 2016 Judge Sheridan entered an Order granting the Defendant's Motion to Dismiss in Russell v. Croscill Home, LLC, Case No. 3:16-CV-01190-PGS-LHG (D.N.J.). [Document No. 14 Filed 10/12/16 in Russell]. I am enclosing a copy of the transcript of Judge Sheridan's October 11, 2016 Oral Opinion on the motion.

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As Your Honor can see from the enclosed Oral Opinion, the Plaintiff in Russell filed a "TCCWNA" lawsuit nearly identical to the TCCWNA Complaint filed in this action. Indeed, the Plaintiff in Russell is represented by the same plaintiff's attorney as in this case. The Plaintiff's attorney in Russell submitted a supplemental brief on these two issues, arguing that the Plaintiff had standing under Spokeo, and that the Plaintiff qualified as an "Aggrieved Consumer" under TCCWNA. [Plaintiff's Supplemental Brief in Opposition to Defendants' Motion to Dismiss Plaintiff's Class Action Complaint or, in the Alternative, to Dismiss the Class-Action Allegations filed as Document No. 13-1 on 08/02/16 in Russell]. Plaintiff's argument on "Spokeo" and on being an "Aggrieved Consumer" in Russell are virtually identical to the arguments made by the plaintiff in this case in opposition to our motion to dismiss.

Judge Sheridan stated in his Oral Opinion that in reviewing the motion he looked at two issues: "standing to sue under Spokeo v. Robins; and whether plaintiff is an aggrieved consumer under TCCWNA." [Oral Opinion at p. 6.] In his Oral Opinion Judge Sheridan specifically rejected Plaintiff's argument in Russell, and held: 1. The plaintiff did not have standing under Spokeo; and 2. The plaintiff was not an

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"Aggrieved Consumer" under TCCWNA. Hence, Judge Sheridan dismissed Plaintiff's Complaint.

Respectfully submitted,



David R. Kott

DRK/nrm
Enclosure

cc: Gerald H. Clark, Esq., Esq.(w/enc., via ECF & reg. mail)
Scott J. Ferrell, Esq. (w/enc., via email)

1 THE COURT: This matter comes before the Court on a
2 motion to dismiss plaintiff's class action complaint, or in
3 the alternative to dismiss the plaintiff's class action
4 allegations pursuant to Federal Rules 12 and 23. On March 2,
5 2016, plaintiff filed this class action complaint alleging
6 that certain terms of the consumer contract issued by
7 defendant violate the New Jersey Truth in Consumer Contract
8 Warranty and Notice Act (TCCWNA) N.J.S.A. 56:12-14. Plaintiff
9 alleges diversity because Croscill is incorporated in Delaware
10 and headquartered in New York, and plaintiff resides in Ocean
11 County, New Jersey. (Complaint at paragraph 3.) The
12 plaintiff also asserts jurisdiction under the Class Action
13 Fairness Act, 28 U.S.C. Section 1332.

1 Most notably, plaintiff alleged that at least four provisions
2 of the terms and conditions violate TCCWNA. They are: (1)
3 a provision which "bars plaintiffs from asserting any cause of
4 action" (complaint at paragraph 19); (2) a provision which
00:03 5 "deprives individuals of their rights under the New Jersey
6 Products Liability Act" (complaint at paragraph 24); (3) a
7 provision which "bars plaintiff from asserting punitive
8 damages in violation of the New Jersey Punitive Damages Act"
9 (complaint at paragraph 33); and (4), a provision which
00:04 10 "denies consumers their rights and remedies under the
11 UCC...for economic harm and/or harm to property." (complaint
12 at paragraph 40).

13 The complaint also alleges in paragraphs 45, 46 and
14 47 that "New Jersey consumer protection laws, including the
00:04 15 TCCWNA, are designed to protect individuals from the type of
16 unconscionable and illegal provisions contained in defendant's
17 terms and conditions." The defendant's imposition upon
18 consumers of the above described terms and conditions violate
19 certain common law standards, including, but not limited to,
00:05 20 the Product Liability Act, the Punitive Damages Act, Uniform
21 Commercial Code, and therefore violates TCCWNA. And finally
22 that the plaintiff brings this statutory claim to "halt
23 defendant's continued use of the illegal language in its
24 disclaimers of liability provisions included in the terms and
00:05 25 conditions as set forth on the defendant's website."

1 Despite the above allegations, nowhere in the
2 complaint does plaintiff allege that the Longmont Tea-light
3 Holder he purchased was defective, or that any of the terms
4 and conditions outlined above were invoked by the defendant in
00:06 any claim that plaintiff had. In fact, the complaint lacks
5 any allegation that plaintiff read the terms and conditions or
6 that the plaintiffs were in any way injured.

8 Since this is a class action complaint, even the
9 scope of the class is very broad, and it does not assert any
00:07 type of injury. The class is defined as "all individuals in
10 the State of New Jersey to whom were offered, given,
11 displayed, or entered into the terms and conditions referred
12 herein on defendant's website...during the applicable statute
13 of limitations through the date of final judgment in this
00:07 action." (Complaint at paragraph 48.)

16 The complaint seeks only one count for violations of
17 TCCWNA. (Complaint at paragraphs 60-72.) There is no injury
18 alleged, except a broad generalization that defendant is a
19 seller (complaint at paragraph 62), and plaintiff is a
00:08 consumer (complaint at paragraph 63). As a result, "plaintiff
21 seeks judgment awarding the plaintiff and class members of not
22 less than \$100 for each violation of TCCWNA", and "order
23 terminating the provisions referred to above." "The purpose
24 of TCCWNA is to prevent deceptive practices and consumer
00:09 contracts, by prohibiting the use of illegal terms or

1 warranties in consumer contracts." *Matijakovich v. PC*
2 *Richards & Son*, 2016 WL 3457011 at *2 (D.N.J. June 21, 2016);
3 (citing *Kent Motor Cars v. Reynolds & Reynolds*, 2002 N.J.
4 424237 (N.J. 2011)).

00:12 5 The Act states in relevant part:

6 "No seller, lessor, creditor, lender or bailee shall
7 in the course of his business offer to any consumer or
8 prospective consumer or enter into any written consumer
9 contract or give or display any written consumer warranty
00:12 10 notice or sign after the effective date of this Act,
11 which includes any provision that violates any clearly
12 established legal right of a consumer or
13 responsibility of a seller, lessor, creditor, lender or
14 bailee as established by state or federal law at the time
00:12 15 the offer is made or the consumer contract is signed or
16 the warranty notice or sign is given or displayed.
17 Consumer means any individual who buys leases, borrows or
18 bails any money, property or service which is primarily
19 for personal family or household purposes. (N.J.S.A.
00:13 20 56:12-15.)"

21 Generally, in order to state a claim under TCCWNA, a
22 plaintiff must allege four elements: (1) the plaintiff is a
23 consumer; (2) the defendant is a seller; (3) the seller offers
24 a consumer contract; and (4) the contract includes a provision
00:13 25 that violates any legal right of the consumer or

1 responsibility of the seller. That's *Matijakovich*, 2016 WL
2 3457011 at *2.

3 Moreover the statute provides that "any person who
4 violates the provisions of this Act shall be liable to the
00:14 5 aggrieved consumer for a civil penalty of not less than \$100,
6 or actual damages or both, at the election of the consumer,
7 together with reasonable attorney fees and costs."

8 In reviewing this motion I looked at two issues:

9 Standing to sue under *Spokeo v. Robins*; and whether plaintiff
00:15 10 is an aggrieved consumer under TCCWNA.

11 Standing. In *Spokeo*, Justice Alito focused on the
12 injury-in-fact requirement to show standing under Article III
13 of the Constitution. 136 S.Ct. 1540 (2016). The
14 injury-in-fact requirement requires a plaintiff to allege an
00:15 15 injury that is both concrete and particularized. *Id.* at 1545.
16 In *Spokeo*, the complaint alleged a violation of the Fair
17 Credit Reporting Act (FCRA). The FCRA has a provision that is
18 similar to the one alleged here under TCCWNA, that is, the
19 FCRA states:

20 "Any person who willfully fails to comply with any
21 requirement of the Act with respect to any individual, is
22 liable to that individual for, among other things, either
23 actual damages or statutory damages of \$100 to \$1,000 per
24 violation, cost of the action, and attorney fees and
00:17 25 possibly punitive damages." That's *Spokeo* at 1543.

19 Looking at the injury-in-fact requirement, Justice
20 Alito stated that Congress cannot erase Article III standing
21 requirements by statutorily granting the right to sue a
22 plaintiff who would not otherwise have standing. *Id.* at
23 1547-48. That is, to establish an injury in fact, plaintiff
24 must show that he suffered "an invasion of a legally protected
25 interest that is concrete and particularized, and actual or

1 imminent, not conjectural or hypothetical." *Id.* at 1548.
2 Particularization requires the injury must affect the
3 plaintiff in the personal and individual way. *Id.* at 1548.
4 Concrete injury must be *de facto*, that is, it must actually
00:20 exist. *Id.* at 1548. "Concrete is not...necessarily
5 synonymous with tangible." And "Congress' role in identifying
6 and elevating intangible harm does not mean that a plaintiff
7 automatically satisfies the injury-in-fact requirement
8 whenever a statute grants a person a statutory right." *Id.* at
00:21 1549.

11 As a result, in *Spokeo* the court remanded the matter
12 for the court to determine whether there was a concrete injury
13 set forth in that complaint. Here, in looking at the Russell
14 complaint, it appears that there was no concrete injury
00:21 sustained by plaintiff. The plaintiff merely alleges a
15 statutory right to \$100 per violation under the *Spokeo*
16 rationale. Congress and in this case the state legislature
17 cannot through statute abrogate the standing requirements of
18 Article III. And, as such, the plaintiff has no standing to
00:23 sue in this case.

21 With regard to TCCWNA, the Court reasons the same
22 way as it did under *Spokeo*. Under TCCWNA, the plaintiff must
23 show that he is an "aggrieved" consumer in order to seek
24 monetary damages of \$100. As noted above, the plaintiff has
00:24 not demonstrated that he's "aggrieved" under TCCWNA. In fact,

1 the plaintiff does not even allege he viewed the illegal terms
2 and conditions on the defendant's website, and there is no
3 allegation of any injury to the plaintiffs. There is nothing
4 that alleges the product was defective, and there is nothing
00:24 5 that indicates that the plaintiff sustained any type of
6 injuries.

7 In this case, we begin with the text of the statute
8 itself. *Watson v. DineEquity*, 1591 Fed. App'x 132, 135 (3d.
9 Cir. 2014). Here, TCCWNA does not define the word
00:25 10 "aggrieved". The Court adopts Black's Law Dictionary
11 definition as "one entitled to a remedy, especially a party
12 who's personal, pecuniary or property rights have been
13 adversely affected by another person's action." Here, the
14 plaintiff has not established any losses stemming from the
00:26 15 terms and conditions of the defendant's website, and therefore
16 he is not an aggrieved consumer that is required to bring the
17 statutory action. The plaintiff has cited to some legislative
18 history which indicates that the legislature allowed recovery
19 of the statutory damages whether the consumer was aggrieved or
00:27 20 not aggrieved; but the plain language of the statute controls.
21 It must be accompanied by some injury in fact to be an
22 aggrieved consumer. There is none shown here. So, even under
23 TCCWNA, the complaint should be dismissed.
24 Since the parties did not brief the *Spokeo* issue, if
00:28 25 either party wishes the Court to reconsider same, they may

1 file a motion for reconsideration.

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